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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

KIMBERLY ALLEN STITH,

Plaintiff and Appellant,

v.

RONALD COLELLA,

Defendant and Respondent.

B206650

(Los Angeles County
Super. Ct. No. PC040281)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Melvin D. Sandvig, Judge. Reversed with directions.

Kimberly Allen Stith, in pro. per., for Plaintiff and Appellant.

Richard G. Becker for Defendant and Respondent.

BACKGROUND

Appellant¹ filed his complaint for “Personal Injury & Contract” on February 28, 2007. Defendants named in that action were Toni Colella, Ronald Colella, Danny Quinton and Michele Mann. The complaint was totally unintelligible and all defendants except Ronald Colella demurred. Ronald Colella sought to join in the demurrer and also moved to strike. The demurrers and motions to strike were heard on July 26, 2007. The trial court sustained the demurrers of Toni Colella, Danny Quinton and Michele Mann without leave to amend. Their motions to strike were taken off calendar as moot. Appellant does not challenge these rulings.²

At the same hearing, the trial court denied Ronald Colella’s motion to join in the others’ demurrers³ and denied Ronald Colella’s motion to strike.

On August 14, 2007, appellant filed a “Motion to Amend Complaint” as to Ronald Colella, and the motion was heard on September 14, 2007. Colella did not oppose the motion and the motion was granted, and appellant’s first amended complaint was deemed filed that date.

The first amended complaint alleged four causes of action: (1) negligence, (2) negligent or intentional infliction of emotional distress, (3) personal injury and (4) malice and oppression. Colella filed a demurrer and motion to strike on October 9, 2007, with a hearing date of November 21, 2007 for the demurrer and November 28 for the motion to strike. Both were apparently rescheduled to be heard together on November 28. Appellant filed opposition on November 26, 2007. At the beginning of

¹ Appellant represented himself in the trial court as well as here.

² The record on appeal does not include copies of the demurrers and motions to strike or any opposition thereto. Nor does it include a transcript of the trial court proceedings.

³ The minute order states that the motion to join was defective and denied. Again, the record on appeal does not include the motion to join in the other defendants’ demurrers or the motion to strike or any opposition thereto.

the November 28 hearing, appellant indicated he had read the court's tentative ruling sustaining the demurrer without leave to amend, and stated: "I would ask the court to reconsider and allow me 15 days with leave to amend, provided I have counsel." The trial court stated: "Just for the record, it's a demurrer to the first amended complaint as to the entire first amended complaint. And I think there are four causes of action. [¶] The court's [tentative] ruling on it was to grant without leave to amend or sustain the demurrer without leave to amend. [¶] You know, when the court looked at it, it failed to state sufficient facts to constitute any cause of action, and it was uncertain. It included claims that are not independent causes of action. [¶] You have had two opportunities to plead your claim. You didn't file any opposition indicating how you can cure any of the defects." From the last remarks, referring to appellant not having filed any opposition, it is unclear whether the court did not consider appellant's late-filed opposition papers or whether the trial court reviewed them but concluded that the papers failed to demonstrate how the appellant would cure the defects in the first amended complaint.

DISCUSSION

We review the sustaining of a demurrer without leave to amend for abuse of discretion. "Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. (*Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.2d 90, 107.) . . . However, the burden is on the plaintiff to demonstrate that the trial court abused its discretion. (*Filice v. Boccardo* (1962) 210 Cal.App.2d 843, 847; *Starbird v. Lane* (1962) 203 Cal.App.2d 247, 262; *Schultz v. Steinberg* (1960) 182 Cal.App.2d 134, 140.) Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. (*Saint v. Saint* (1932) 120 Cal.App. 15, 23-24 [7 P.2d 374].)' (*Cooper v. Leslie Salt Co.* [1969] 70 Cal.2d 627, 636.)" (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349-350.)

Although the first amended complaint is less than totally intelligible, appellant has made progress in refining his claims when it is compared to the complaint. Appellant's

opposition to the demurrer and his opening brief demonstrate kernels of potentially viable causes of action for conversion and intentional infliction of emotional distress. Since Colella's demurrer to the first amended complaint was his first successful challenge to the pleadings, we conclude that it was an abuse of discretion for the trial court to sustain the demurrer without providing appellant with an opportunity to amend it.

DISPOSITION

The judgment is reversed. The trial court is directed to sustain the demurrer to the first amended complaint with leave to amend. Appellant Stith is entitled to costs on appeal.

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WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.